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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 531

ELMER HARTZEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 118–126) is reported at 138 F. (2d) 169. The memorandum opinion of the trial judge denying petitioner's motion for a new trial appears in the record at pp. 101–108.

JURISDICTION

The judgment of the circuit court of appeals was entered October 14, 1943 (R. 126–127), and a petition for rehearing was denied November 10,

1943 (R. 127). The petition for a writ of certiorari was filed December 10, 1943, and was granted January 10, 1944 (R. 129). The jurisdiction of this Court is conferred by section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court properly instructed the jury concerning the offenses described in Section 3 of the Espionage Act of June 15, 1917, particularly with respect to the element of intent.

2. Whether there was evidence to sustain the conviction of petitioner on the counts charging an attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military forces of the United States.

3. If the second question is answered in the negative, whether there was sufficient evidence to sustain the conviction on the counts charging willful obstruction of the recruiting or enlistment service of the United States.

STATUTE INVOLVED

Section 3 of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 219, 41 Stat. 1359 (50 U. S. C. 33), provides in pertinent part as follows:

> Whoever, when the United States is at war, * * * shall willfully cause or attempt to cause insubordination, disloyalty,

mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

STATEMENT

Petitioner and two others were charged in a seven-count indictment (R. 1–14), returned in the United States District Court for the Northern District of Illinois, with violations of Sections 3 and 4 of the Espionage Act of 1917 (50 U. S. C. 33, 34), by publishing and disseminating, in time of war, three pamphlets—one entitled "The British: an Inferior Breed," another "The Jew Makes a Sacrifice," and the third designated in the proof as "The Diseased Spinal Cord" (R. 49, 50, 52) but unentitled in the indictment. Counts 1, 3, and 5 charged that by these actions the defendants unlawfully, willfully and knowingly obstructed the recruiting and enlistment service of the United States; counts 2, 4, and 6 charged that they unlawfully, knowingly, and willfully caused and attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States; and count 7 charged a conspiracy to violate Section 3, in violation of Section 4 of the Espionage Act.

Petitioner was found guilty on all counts (R. 110) and was sentenced generally to imprisonment for five years (R. 111). On appeal his conviction was affirmed (R. 126–127).[1]

It is undisputed that petitioner wrote the three articles charged in the indictment, had them mimeographed by his co-defendant Soller, and sent out about six hundred copies of them, anonymously, to persons on his mailing list (R. 34–35, 58–60, 80–81). In order to avoid detection, he deposited the envelopes in several different mail boxes and endeavored to leave no fingerprints (R. 84–85). He stated that he compiled his mailing list from various sources—lists of persons prominent in the America First Committee; commanders of the American Legion; organizations which he considered patriotic, such as the Daughters of the American Revolution and We

[1] Petitioner's codefendants, Mecartney, an attorney, and Soller, the mimeographer of the pamphlets, were found guilty on counts 5, 6, and 7 (R. 110), but their convictions were set aside—Mecartney's by the trial judge on motion for a new trial (R. 108), and Soller's by the circuit court of appeals on the ground that there was no proof that he knew what use petitioner made of the pamphlets (R. 125–126). Since these two defendants were the only co-conspirators of petitioner named in the indictment, the setting aside of their convictions makes it impossible, of course, to sustain petitioner's conviction upon the basis of the conspiracy count. However, petitioner was found guilty on all of the other counts of the indictment and the sentence rendered was one permissible under any of those counts.

The evidence concerning Soller has been omitted in printing the record in this Court.

the Mothers Mobilize; fraternities, sororities, and labor unions, (R. 59, 80). The Government proved that the first two pamphlets were mailed to the Commanding General of the United States Army Air Forces (R. 17–18) and to Colonel Hastings of the General Staff (R. 18), and that all three pamphlets were mailed to the Infantry Journal, a service publication, and were read in the course of their duties by two Army officers (R. 17). It also showed that one or more of the pamphlets were mailed to the President of Northwestern University (R. 18), the American Newspaper Publishers Association (R. 19), the Lions International (R. 19–20), the Kiwanis International (R. 19, 21), the Air Line Pilots Association (R. 20), and the American Legion (R. 20). A batch of addressed envelopes was found in petitioner's home, secreted under a bathtub, together with several of the pamphlets (R. 21–22); 18 [redacted] of the envelopes were addressed to army officers (Gov. Ex. 41, R. 31), though petitioner failed to mention this class of addressees in describing his mailing list before trial (R. 59).

The pamphlets are set out in full in the record (R. 49–54). They depict the war as a betrayal of the United States by the President to the "British-Jewish yellow race." The British are characterized as an "inferior breed" and a "degenerate empire" (R. 49); the Jew as an "oriental hyphenated American, propagandist for

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bloody Joe and the British (Jewish) empire," waiting until "many of the young men of America are killed—when the sick, the exhausted, the cunning remain—then he will, as in Russia, crawl from his nest" (R. 50, 52); the attack on Pearl Harbor was "evidence of justice" because "while trying to save a yellow race in the Atlantic we were hit a deadly blow by a yellow race in the Pacific" (R. 50). The personal references to the President appear at pages 52–54 of the Record. The concluding portion of the third of the pamphlets (*ibid.*) urges, if necessary, starvation of our allies, our internal dissolution by a war of race against race, and "occupation by foreign troops until we are able to stand alone" (R. 54). Pamphlets of similar tenor, composed and distributed by petitioner in 1941, before our entry into the war, were received in evidence for the limited purpose of their bearing on petitioner's intent (R. 61–75, 56–57, 91–92). The full text of the three pamphlets specified in the indictment follows (R. 49–54):

THE BRITISH:

An Inferior Breed

Are they degenerate?

Plainly. Never again shall they be permitted to try to bring the slinking death of starvation to Europe, squealing hysterically as they do so about "freedom".

What is the present position of our "protectors," proclaimed saviors of Poland?

Now on the lease-lend dole, they are a kept woman.

Are they a cultured people?

Standing as an outpost to the continent of Europe, they are a parasite on its art, science and civilization.

In what way are they kept flying?

The Germans keep 'em flying wherever they find them. They run at the mouth as well as the bowels.

Will the British Isles be policed?

It will be unnecessary. When the people upon whom they are fastened withdraw their support, they will collapse.

What is the new blasphemy?

Making Christianity a slimy thing for those who crawl and creep by an island breed which—possessed of an empire obtained by aggression—points the finger of guilt at others. They are now fighting for Christ with bloody Joe.

Who betrayed America to the empire of the British-Jewish yellow race?

Rosenfeldt. We are victims of his Infantilism; he cannot stand alone.

Are Jews rushing forward to war after urging you to crush 'em?

No. But when America is exhausted they, as in Russia, will slither forth to sink their fangs into its body.

Are Americans United?

Yes. Externally with the corpus of a degenerate empire: internally with the sick body of "our leader".

What is behind the doctrine of "no appeasement"?

The fear of aggression on the bloated domains of an empire which cannot stand alone;

The inhuman cruelty of America's first blood soaked boom;

The rumble of world revolution—repercussion of its indecencies;

The effort of the Jew—vicious persecutor of peoples—to save himself;

The disease of a Paralytic who wants to be a hero as compensation for his ailment;

The beginning of insanity as the masses of the so-called "democracies" are led toward the destruction of Europe, homeland of the West.

Why was Pearl Harbor evidence of justice?

While trying to save a yellow race in the Atlantic we were hit a deadly blow by a yellow race in the Pacific. Like a cow hit on the head by a hammer when led to slaughter, we now follow "our leader" as he moves forward on a sick spine to war.

THE JEW MAKES A SACRIFICE:

The Forthcoming Collapse of America

Our blood-soaked boom of the first World War was followed by a speculative orgy, then collapse. A similar maladjust-

ment now seeks an outlet in another blood-soaked boom which will end as before. In all of this the Jew—oriental hyphenated American, propagandist for bloody Joe and the British (Jewish) empire—has been an eager participant. Indeed, like a snake forced from its nest, the slimy blood lust of the "holy people" now stands revealed—for is it not evidence that the Jew hates bloodshed only when his own skin is in danger?

Let us consider briefly some of his characteristics.

The mentality of the Jew was exemplified recently by Leon Henderson when he wrote that "in 1942 as our contribution in the way of the merchandise of death, we are prepared to deliver a greater quantity of goods than this entire Nation had to keep it alive in 1932". The Jew, in fact, makes his way among those with whom he lives by boring from within—by aggression concealed under holiness and hatred of force. When cornered he makes loud outcrys about the guilt of others who "persecute" him.

He does not engage in many occupations such as that of a farmer, sailor, mechanic, necessary for the support of a state; he must, therefore, live among other peoples to prevent his own collapse. Since the weight of the community in which he lives does not rest upon him, his position as a specialized group is unstable; he oscillates back and forth, reflecting as he does

so fragments of what he considers the world to be, through all of which runs a thread of egoism which portrays him as a grand parasitic ruler.

He moves in a community with the idea of retaining his identity while at the same time reducing the disparity between himself and others by lowering standards, as in business. He escapes or is unfitted for many kinds of indispensable work, but makes a loud outcry about persecution when vents for his racialism are interfered with. As he lays concealed or slithers around within "democracy", part of his technique is to stress the need for tolerance, particularly so if, as in Germany, he is caught at his unclean work.

As a parasite he is sensitive to trends: he feels influence quickly which effect his welfare. Associated with his intrusion into the privacy of others in the interests of his own preservation is a fear of isolation. Connected with his frequent need for overcoming disgust for his person is an emphasis on money, wherewith he buys his way. Among related peoples—Turks, Arabians—he does not make much headway.

The Jew God is used for purposes of the greatest of all idolatries—self Worship and survival. For if a people believe they are "chosen" almost anything they do is regarded as right if it preserves them: God is used to get beyond good and evil. Note, for instance, the two sides of the

Bible—the first teaching vengeance, the second meekness. A vast scope is therewith obtained for emphasizing the side suited to his (or your) needs, that is, God becomes a two-faced instrument of torture—a bone crusher for use by the cunning. Today, in fact, almost any crime may be committed in his name in connection with fine words such as "freedom." How else justify blood-soaked booms; attempts to starve Europe by blockade; an alliance with bloody Jap; and the massing of enormous quantities of men and materials with which to "crush" the Germans—except by offsetting the degeneracy of such acts by declaring them to be dictated by the "spirit".

The oriental Japanese struck at Port Arthur in 1904, and at Pearl Harbor while negotiating. The Jew does not have their manfulness for open warfare, but he will—while conserving his own blood—eventually strike those with whom he lives in the back. He is now infiltrating into Government jobs under cover of "no race prejudice". He is, in fact, "dying" for the coming of bolshevism by making ready for your collapse. After many of the young men of America are killed—when the sick, the exhausted, the cunning remain—then he will, as in Russia, crawl from his nest.

Are you not weary of the observation that the international parasite survives to see nations come and go? Distinguish then you must between white and yellow races or accept the slaughter of your sons by in-

ternal revolution of [or:] war abroad. Crush my enemies he screams! But there can be no further appeasement of his blood lust: no peace until the slaughter he brings to others returns upon himself. He must be eliminated as an active element in the community.

The Diseased Spinal Cord

Wilson died an invalid; Roosevelt became president one. What is the social significance of his condition?

A clue is given in the statement that syphilis is "the result of an illness of moral, social and racial instincts" of which prostitution is an integral part. Similarly the breakdown of Wilson after the "peace" was probably connected with reactions from the emotional debauchery of preceding years. It is, therefore, suggested that the epidemic of paralysis in New York State at a later time had a source in the weakening of nervous systems, brought about by the emotional self-masturbation of stories of the "bad" Germans.

Our leader—safe in Washington—escaped the actual horrors of war, but he could not escape the virus of a child's disease. As with syphilis his paralysis is indicative of severe maladjustments within the nation. He reproduces within his body our internal breakdown: he is in fact a degenerate who now seeks ways of having us cure him of his ailment.

United with a paralytic

With the cunning and sweetness of a cripple he kept us out of war. His duplicity is in part a result of a lack of coordination between brain and injured nervous system. Connected with the accompanying inferiority is a fear of isolation—a craving to be united. He would as a consequence extend his sickness over all the world. Almost everyone would then be equal, united, with no one able to stand alone.

Not long ago we "saved ourselves" by a program of relief—from the enervating effects of which we were unable to rise by manful effort. From the accompanying decay an external enemy was needed upon which to fasten the blame. Uniting with the decaying carcass of the British empire and war against the Germs were taken as solutions to the problems; they serve as counterpoises to our internal breakdown. For the condition of which his illness is a symptom requires continually widening spheres of action to prevent breakdowns from its ravages.

The enemy within

Hidden within the present program to save humanity are germs of infantilism, paralysis and death. For we now follow, not a little child, but a man with a child's disease.

I dare you to hit me said our leader to the "bad" dictators. He now twists on

his weak spine as we move irresistably toward the feared spectre—isolation. For as the people of Europe slowly unite to repel invaders who mouth over phrases about peace, God and civilization, many are beginning to recoil with horror from a proposed invasion of Americans who, as before, would only accentuate world revolution.

Crush my enemies screams Jewry; be bold; take the offensive; we'll back you up. We're fighting for freedom, says our leader, with his sick body coiled around the brain as with a snake prepared to strike. We're fighting to save Poland say the British hysterically; we hate other peoples' aggression.

America was betrayed. The butchery, misery and death they would take to Germany must now, if necessary, be returned upon ourselves by:

A stench from rotting carcasses of those who would again invade Europe;

Starvation for millions of British who thought they could starve others;

Dissolution from an internal war of race against race;

Occupation by foreign troops until we are able to stand alone; and at last

The appointment of a bedside cabinet to investigate the condition of (Rosenfeld) our leader.

On cross-examination petitioner admitted that the purpose of mailing the documents was not to improve the morale of the troops; that he thought

the troops ought to know, and the country also, the consequences of war; that they ought to consider whether America was betrayed and if so, "to fight for Americans"; that he was opposed to the Americans and the British invading Europe. (R. 85).

In his instructions to the jury, the trial judge charged (R. 90–91):

> Now, it does not make any difference ordinarily what anyone may think about any race or people. One may be anti-Semitic or may be violently opposed to anti-Semitism, but he has a right to his private opinion. Ordinarily he has a right to express that opinion, and his opinion may be hateful to people, to other people, but he cannot be imprisoned because his opinion happens to be hateful to other people. He may not like the President of the United States, and he may like the President of the United States, and think the President can do no wrong, or he may hate the President of the United States and think the President can do nothing that is right. That is not the question in this case what individual opinions are. There is just this limitation, so far as this case is concerned: One the question of right of free speech with reference to the President or the people in charge of the administration of our affairs, the affairs of war, and that is, they are prohibited by this statute from any expression of opinion calculated, or which would like-

ly have the effect of interfering with recruiting or enlistment or which would cause insubordination in the army. Now, the two things must concur, and it must appear that the publication was calculated to have that effect, and that the defendant intended it to have that effect.

Now, you are to determine whether the publications were calculated to have that effect from the publication itself. It is for you to determine whether these publications, the language used in these publications, was calculated to have that effect, and then you will have the question of intent. I might say in this connection, I might, in describing the limitations on free speech, I might use the language that was used by Justice Oliver Wendell Holmes. He said: "The question in each case is whether the words used are used under such circumstances or of such a nature as to create clear and present danger that they will bring about the effect that Congress has a right to prevent."

That is the rule that you must apply in determining whether these publications were calculated to have that effect, as to whether the words used in these publications are such, or were used under such circumstances or were of such a nature as to create a clear and present danger that they would interfere with enlistment or recruiting or would cause insubordination in the army, because then they are pro-

hibited by the statute that I have read to you.

Then there is a question of intent. It is charged in the indictment they were intended to produce those results. In determining whether they were used with that intent, you will take into consideration all of the circumstances in the case, and you must take into consideration the words used; and whether from the words used themselves you could find that there was such intent, and you are at liberty to infer that, to take into consideration the language used, the intention and the probable result of such language used, you are at liberty to infer that from all of the facts and circumstances that you have heard testified to here in the evidence, the circumstances under which they were issued.

In response to a request by petitioner's counsel for a more detailed instruction on the specific intent required under the statute (R. 94, 98–99), the judge charged:

It is necessary for the government to prove that the defendants intended to interfere with the enlistment and recruiting services and intended to cause insubordination. I thought I covered that, but if I did not, that is a necessary element of an offense, and in determining whether there was such an intent you must consider all the evidence in the case, the nature of the language used, the circum-

stances under which it was used, and you are at liberty to presume that the defendants intended the natural and probable result of the language used. [R. 98–99.]

SUMMARY OF ARGUMENT

The general validity of Section 3 of the Espionage Act of 1917, sustained in *Schenck* v. *United States*, 249 U. S. 47, and related cases, is not here challenged. The questions involved relate to the correctness of the instructions to the jury and the sufficiency of the evidence to sustain the conviction. Since the sentence was a general one, and less than might have been imposed on any count, the judgment may be sustained if petitioner was properly convicted under either the counts relating to attempt to cause insubordination or disloyalty in the military forces or the counts charging wilful obstruction of the recruiting and enlistment service.

1. The trial court properly instructed the jury on all issues, including specific intent and clear and present danger. Throughout the charge the requirement of intent to bring about the evils denounced by the statute was emphasized. It was only as one factor from which the jury might infer the specific intent of petitioner that the trial court permitted them to consider the natural and probable result of the language used. Substantially the same charge on this issue was given in *Debs* v. *United States*, 249 U. S. 211, and was

expressly approved in the opinion of Mr. Justice Holmes for this Court. The trial court thus did not rely on the subsequent decisions of this Court (*e. g., Abrams* v. *United States,* 250 U. S. 616; *Pierce* v. *United States,* 252 U. S. 239), in which convictions were upheld without insistence upon a showing of specific intent to cause the results denounced by the statute. Likewise, the trial court followed the test of clear and present danger, attributing it, in the charge, to Mr. Justice Holmes. The charge as a whole was notably fair to the defendants. The jury was cautioned that individuals are entitled to express opinions which may be hateful to other people and that violent anti-Semitism or dislike of the President is not a ground of criminality.

2. The evidence was sufficient to sustain the conviction on the counts charging an attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military forces. Petitioner's intention may be drawn from the pamphlets themselves, the circumstances of their distribution, and his pretrial statement and testimony, together with similar pamphlets prepared and distributed by him prior to our entry into the war. Among those to whom the pamphlets were sent were several important army officers. Additional addressed envelopes were found secreted in petitioner's house, containing the names of other army officers. The documents themselves depict the war

as a gross betrayal of this country by the President, denounce our allies as degenerate, and call for an abandonment of the war in favor of a racial struggle against the so-called yellow races, including the British. When addressed to military personnel, these appeals were an attempt to break down the will to carry on the war and to induce members of the armed forces to turn the war against their allies and comrades in arms. There was no showing of a more dominant intention on the part of petitioner, such as an endeavor to win converts to a political or economic doctrine. This is not a case of criticism of strategy or leadership or objectives in the war; nor is it a case of utterances which might merely have the effect of causing discontent. Petitioner admitted in his testimony that the effect of stating to military personnel that they had been betrayed would be to have them consider whether this were so, and if so "to fight for Americans." In the idiom of petitioner, this meant to fight against those united with us in the war and against other Americans.

The jury was entitled to find that petitioner's activities constituted a clear and present danger of bringing about insubordination or disloyalty among members of the armed forces. Those activities plainly amounted to an attempt within the criminal law; and the clear and present danger test as formulated by Mr. Justice Holmes bears

obvious relationship to the concept of an attempt. No further acts on petitioner's part were necessary. He is not relieved of responsibility for an attempt by reason of the strength of the intended victims. It cannot be said, as a matter of law, that petitioner's endeavor was so fanciful that it must be classed with attempts to cause death by witchcraft. Such a conclusion would ignore much recent history and the deliberate use of psychological warfare by belligerents. It would ignore, also, the military situation at the time the pamphlets were distributed. The nation's power of self-protection and protection of its armed forces against deliberate attempts to subvert them in the midst of war has been exercised by Congress upon a judgment that in such quarters, and at such a time, the remedy for evil counsels cannot await the process of correction by counter-persuasion. Cf. Brandeis, J., dissenting, in *Gilbert* v. *Minnesota*, 254 U. S. 325, 336–338.

3. If it is necessary to consider the counts relating to obstruction of the recruiting and enlistment service, it is submitted that the evidence also supports the conviction on that charge. Although the statute does not in terms deal with attempts so to obstruct, the concept of obstruction itself includes the placing of impediments in the way, even though actual prevention of enlistment or recruiting is not shown. It is settled, moreover, that the statute applies as well to the processes of com-

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pulsory service as to voluntary enlistment. Among those to whom petitioner addressed his pamphlets were the Airline Pilots Association, the American Legion, fraternities and labor unions. The jury was entitled to find that he intended his publications to weaken the will to join the armed forces. In counseling the destruction of those who would invade Europe, and the occupation of the United States by foreign troops if necessary, petitioner urged responses on the part of his addressees which are incompatible with voluntary enlistment or the orderly processes of the draft.

ARGUMENT

The general validity of Section 3 of the Act of June 15, 1917, under which the present conviction was had, is not here challenged. It was sustained by unanimous decisions of this Court twenty-five years ago. *Schenck* v. *United States*, 249 U. S. 47; *Baer* v. *United States, ibid.*; *Debs* v. *United States*, 249 U. S. 211; *Frohwerk* v. *United States*, 249 U. S. 204; *Sugarman* v. *United States*, 249 U. S. 182. Mr. Justice Holmes, who wrote the opinion in each of these cases, said in *Schenck* v. *United States, supra*, at 52:

> When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

The questions raised in the present case relate to the correctness of the trial court's instructions to the jury and the sufficiency of the evidence to sustain the jury's verdict. These questions must be considered, of course, in the light of the provisions of the statute and the applicable decisions of this Court dealing with the permissible limits of restrictions on speech in time of war. Before considering the correctness of the charge and the sufficiency of the evidence in the light of these standards, it should be observed that the judgment of conviction must be sustained if it can be upheld on any of the substantive counts of the indictment.[2] The verdict was a general one, and the general sentence of 5 years was less than might have been imposed under any single count; the statute authorizes sentence up to 20 years. In these circumstances it is well established that a conviction properly had on one count will sustain the judgment. *Hirabayashi* v. *United States*, 320 U. S. 81, 105; *Whitfield* v. *Ohio*, 297 U. S. 431, 438; *Brooks* v. *United States*, 267 U. S. 432, 441; *Pierce* v. *United States*, 252 U. S. 239, 252–253; *Abrams* v. *United States*, 250 U. S. 616, 619. In short, the conviction was properly affirmed if it is supported either under the counts charging an attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the

[2] We do not rely on the conspiracy count, for the reason stated *supra*, p. 4, footnote 1.

United States or under the counts charging willful obstruction of the recruiting and enlistment service of the United States.

I

The trial court properly instructed the jury on all issues including specific intent and clear and present danger

The principal objection raised by petitioner to the trial court's charge concerns the instructions on the element of specific intent. This was the only portion of the charge to which counsel for the petitioner took exception (R. 87, 94–99). In this Court the petitioner argues (Brief, pp. 57–66) that the instructions given did not require the jury, in order to render a verdict of guilty, to find that the petitioner specifically intended to bring about the results described in the statute. We submit that the instructions did so require and were entirely correct.

In his main charge the trial judge said (R. 91):

> * * * It is for you to determine whether these publications, the language used in these publications, was calculated to have that effect, and then you will have the question of intent.

After stating the clear and present danger test, obviously having reference to the first portion of the statement quoted above, the court continued (R. 91):

> Then there is a question of intent. It is charged in the indictment they were in-

> tended to produce those results. In determining whether they were used with that intent, you will take into consideration all of the circumstances in the case, and you must take into consideration the words used, and whether from the words used themselves you could find that there was such intent, and you are at liberty to infer that, to take into consideration the language used, the intention and the probable result of such language used, you are at liberty to infer that from all of the facts and circumstances that you have heard testified to here in the evidence, the circumstances under which they were issued.

Further in the charge the court recurred to the issue of specific intent and stated (R. 92):

> The charge is that the defendants published and disseminated these documents with the intent to interfere with enlistment and with an intent to cause insubordination. That is the question for you to determine, not whether any person actually was injured, but whether the publications were issued for that purpose and with that intent and were calculated to have that effect.

Counsel for the defendant, at the close of these instructions, referring to the portions on specific intent, stated: "I thought that was a little more liberal than the government was entitled to" (R. 96). Counsel added: "If you make a statement with reference to the specific intent, the

particular intent, whatever you want to call it, I will be satisfied with it" (R. 97). Thereupon the court gave additional instructions to the jury including the following (R. 98–99):

> It is necessary for the government to prove that the defendants intended to interfere with the enlistment and recruiting services and intended to cause insubordination. I thought I covered that, but if I did not, that is a necessary element of an offense, and in determining whether there was such an intent you must consider all the evidence in the case, the nature of the language used, the circumstances under which it was used, and you are at liberty to presume that the defendants intended the natural and probable result of the language used.

The clause of which petitioner now complains is the concluding one, "and you are at liberty to presume that the defendants intended the natural and probable result of the language used." It is clear from the context that this statement was not, and could not have been understood to be, an alternative to a requirement of specific intent. On the contrary, the jury was explicitly instructed that in inferring the intent of petitioner they were entitled to take into consideration all the circumstances, including the language used, the circumstances under which it was used, and the natural result of such language. The emphasis

throughout the charge was on the requirement of specific intent; since this is a matter necessarily of inference, it was entirely proper to include as one, but only one, of the circumstances to be considered the probable consequences of the language employed. A lay jury would be even less likely than a trained lawyer to find in the charge any antithesis between specific intent and a constructive intent presumed as a matter of law.

Substantially the same charge on this issue was given in *Debs* v. *United States, supra,* and was unanimously approved by this Court. In that case the trial court said: "In passing on the question of the defendant's intent, you should also bear in mind that a person is presumed to intend the natural and probable consequences of his words and acts" (Record in No. 714, 1918 Term, p. 276). Indeed, the trial court went further in that case and said: "Ought he not to have reasonably foreseen that the natural and probable consequences of such words and utterances would or might be to cause insubordination, disloyalty, or refusal of duty in the military forces of the United States?" (*ibid.*). The instruction of the trial court in the *Debs* case on the question of specific intent was singled out for special commendation by Mr. Justice Holmes in a passage quoted in petitioner's brief (p. 59). His opinion states (249 U. S. at 216):

> We should add that the jury were most carefully instructed that they could not

> find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, etc., and unless the defendant had the specific intent to do so in his mind.[3]

In addition to the charge upon specific intent, the court in the present case, as has been noted, instructed the jury that the words used must create a clear and present danger that they will bring about the effect that Congress has a right to prevent. In so charging, he explained to the jury that he was using "the language that was used by Justice Oliver Wendell Holmes." This attribution of the language of the instruction could not have failed to give it particular impressiveness. Indeed, counsel for petitioner stated, "I might say, I was pleased with the explanation or the expression about Judge Holmes" (R. 96).

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[3] In the *Abrams* case, on the other hand, the charge with respect to intent referred only in passing to the critical element required by the statutory provision of the 1918 Act there involved, "to cripple or hinder the United States in the prosecution of the war." The instruction did not distinguish between such an intention and one simply to curtail production of things necessary to the prosecution of the war. Moreover, the trial court in that case discussed intention even more broadly, saying: "It is perhaps not amiss for me to say that men who are actuated by pure and lawful motives as a rule act in the open daylight. People who have circulars to distribute, and they intend no wrong, go up and down the streets circulating them." (Record in No. 316, 1919 Term, pp. 237–238.) See Chafee, *Free Speech in the United States* (1941 ed.) 125–126.

Petitioner appears to contend (Br., pp. 35–38) that the documents must show on their face a specific intent to bring about the evils condemned by the statute. It has never been thought, of course, that the circumstances under which the documents were distributed are irrelevant on the issue of intent; and this is apparently conceded by petitioner. No request was made that the court limit the jury to a consideration of the documents themselves, and such a request would plainly have been erroneous. Indeed, in the last war it was insisted by Judge Amidon, who was well known for his scrupulous protection of the rights of defendants under the Espionage Act, that the indictment itself must set forth the circumstances under which the utterances were made. *United States* v. *Schutte*, 252 Fed. 212 (D. N. D.). It was, to be sure, thought at one time by Judge Learned Hand that as a matter of statutory construction, though not of constitutional law, the utterances must on their face constitute advocacy of the results prohibited by the statute. *Masses Publishing Company* v. *Patten*, 244 Fed. 535 (S. D. N. Y.). That view was, however, rejected on appeal (246 Fed. 24 (C. C. A. 2)). The circuit court of appeals there quoted with approval the observation of Judge Hough, in rejecting the contention that the defendant must have by direct words advocated or

urged what the statute forbids persons to attempt to cause (245 Fed. 102, 105–106):

> The Postmaster General had found as a fact (inter alia) that the "Masses" sought to promote a mutinous, disloyal, and insubordinate spirit among troops; I think the District Court did not disagree as to that. But it was held that, because the plaintiff stopped short of urging resistance, the law was not violated. The questions presented, or some of them, are: (1) Is such view of the law correct? * * *
>
> * * * * *
>
> As to the first query, it is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act. Oratio obliqua has always been preferred by rhetoricians to oratio recta; the Beatitudes have for some centuries been considered highly hortatory, though they do not contain the injunction "Go thou and do likewise." At all events, it is a point plainly suitable for the attention of an appellate court.

Subsequently, Judge Hand recognized that the view which he originally took was not elsewhere accepted. In *United States* v. *Eastman*, 252 Fed. 232, 233 (S. D. N. Y.), he said: "The principle now established, and for that matter recognized elsewhere in the District Courts, depends upon the likelihood of the words to produce the result, coupled with the specific intent." And in *United*

States v. *Nearing*, 252 Fed. 223, 228 (S. D. N. Y.), he said, "In short, the test was made, not objective only, but in part subjective, as is indeed often the case in the definition of crime." Thereafter the opinion of Mr. Justice Holmes in the *Schenck* case settled the point. In *Pierce* v. *United States*, 252 U. S. 239, 272, Mr. Justice Brandeis, dissenting, observed as a weakness in the Government's case that no evidence of intent was introduced save as it was found in the leaflet itself. Certain of the decisions of this Court have indeed upheld convictions without insistence upon a showing of specific intent. *Pierce* v. *United States, supra; Abrams* v. *United States*, 250 U. S. 616; cf. *Schaefer* v. *United States*, 251 U. S. 466. But in the present case the trial court refrained from following those decisions and instead fashioned its instructions to accord with the principles laid down by Mr. Justice Holmes.

On the whole case, the charge to the jury was notably fair to the defendants. The jury was admonished at some length that individuals are entitled to express opinions which may be "hateful to other people", and that violent anti-Semitism or dislike of the President of the United States is not a ground of criminality (R. 90). The jury was told that the question was whether the expression of opinions would likely have the effect of interfering with recruiting or enlistment or would cause insubordination in the Army.

"Now, the two things must concur, and it must appear that the publication was calculated to have that effect, and that the defendant intended it to have that effect" (R. 90–91). The importance of a dispassionate and discriminating charge, such as here given, would be difficult to overstate.[4]

II

The evidence was sufficient to sustain the conviction for attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the military forces

Counts two, four, and six of the indictment charge an attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States. Each of these counts charges, as the means employed, the preparation and dissemination of a writing among persons then members of the military and naval forces of the United States. Count two refers to the document entitled "The British: An Inferior Breed" (R. 4), set forth in full in Count one (R. 2–3) and in the proof (R. 49–50). Count four refers to the document entitled "The Jew Makes a Sacrifice; The Forthcoming Collapse of America" (R. 9), set forth in full in Count three (R. 6–8) and in the proof (R. 50–52). Count six refers to the document entitled in the proof "The Diseased Spinal Cord," set forth in part in Count

[4] Compare the examples given in Chafee, *Free Speech in the United States* (1941 ed.) 74–79.

five and fully in the proof (R. 10, 11, 52–54). It is submitted that the evidence sustains the convictions on Counts two, four, and six, any one of which would be sufficient to support the judgment and sentence on appeal.

Since there is no dispute over the fact that petitioner composed and distributed the articles, the essential issues resolved by the jury and both courts below in the Government's favor relate to the elements of specific intent and clear and present danger of the evils condemned by the statute.

1. *Specific intent.*—The evidence of petitioner's intent rests on the articles themselves and the circumstances of their distribution, supplemented by his pretrial statement, his testimony, and certain similar articles previously composed by him. The three articles forming the basis of the indictment should, of course, be read in their entirety and not in fragments (see Brandeis, J., dissenting in *Schaefer* v. *United States*, 251 U. S. 466–483). They have been printed in the Statement, supra, at pp. 6–14. Each of them builds up to a climax at the close, and we here reproduce only the concluding passage of each:

> *Why was Pearl Harbor evidence of justice?*
>
> While trying to save a yellow race in the Atlantic we were hit a deadly blow by a yellow race in the Pacific. Like a cow

hit on the head by a hammer when led to slaughter, we now follow "our leader" as he moves forward on a sick spine to war.

* * * * *

Are you not weary of the observation that the international parasite survives to see nations come and go? Distinguish then you must between white and yellow races or accept the slaughter of your sons by internal revolution of [or] war abroad. Crush my enemies he screams! But there can be no further appeasement of his blood lust: no peace until the slaughter he brings to others returns upon himself. He must be eliminated as an active element in the community.

* * * * *

America was betrayed. The butchery, misery and death they would take to Germany must now, if necessary, be returned upon ourselves by:

A stench from rotting carcasses of those who would again invade Europe;

Starvation for millions of British who thought they could starve others;

Dissolution from an internal war of race against race;

Occupation by foreign troops until we are able to stand alone; and at last

The appointment of a bedside cabinet to investigate the condition of (Rosenfeld) our leader.

These pamphlets, to paraphrase them in the mildest terms, depict the war as a gross betrayal

of America, denounce our allies as degenerates, and assail the integrity of the commander in chief. Further, they call for an abandonment of our allies and a conversion of the war into a racial conflict, in which the British are regarded as a "yellow race" (R. 49, 50); they urge, further, an "internal war of race against race" and "occupation by foreign troops until we are able to stand alone" (R. 54). If it be thought that the concluding portion of the third article is not to be taken as hortatory, despite the words "must now, if necessary, be returned upon ourselves," the passage may be compared with the conclusion of an earlier article voicing unmistakably a similar incitement (R. 63):

> Men and women, who believe in decency, rise in protest at our bestiality. If necessary let the protest be long silent, implacable, until America is torn into parts by internal revolution, as retribution for a concealed sadism of which the Jew is a spokesman.

These pamphlets were mailed to persons of petitioner's own choosing; it is undisputed that he compiled his own mailing lists and mailed the documents himself. Among those whom the proof shows to have been so addressed are General Arnold, Commanding General of the Army Air Forces, who received and read the first two pamphlets (R. 17–18), Colonel Hastings of the Military Intelligence Division, stationed at San An-

tonio, Texas, who received and read the first two pamphlets (R. 18), and the editors of the Infantry Journal, a service publication, who received the three pamphlets, which were read by Lt. Col. Greene and Major Ulmer (R. 17). The three pamphlets were also received by the Air Line Pilots Association (R. 20) and the Commander of the Illinois Department of the American Legion (R. 20). Moreover, there was found in Hartzel's home, secreted under a bathtub, a paper bag containing 188 envelopes, together with three copies of the first two pamphlets (R. 21–22; Gov. Exh. 41, R. 31). Each envelope bore the name and address of an individual or organization, apparently typewritten by the petitioner himself (R. 34–35). The addressees included General George C. Marshall, Major General Henry H. Arnold, Major General William Bryden, General I. J. Philipson, General F. B. Wilby, Brigadier Generals A. E. Brown, J. T. McNarney, L. T. Gerow, R. A. Wheeler, H. L. Twaddle, and Sherman Miles, Colonel Charles A. Lindbergh, Capt. Edward Rickenbacker, the Army and Navy Union, General F. E. Uhl, General Daniel Van Voorhis, General H. C. Pratt, Major A. G. Williams, and Lt. Gen. William S. Knudsen. It is true that the majority of those on petitioner's mailing list and of the addressees of the envelopes were not members of the armed forces; they included labor unions, fraternities, educators, and other persons.

It is submitted, however, that utterances which are intended to cause disloyalty when disseminated generally, are intended to cause disloyalty in the military forces when deliberately and specifically addressed to military personnel. As was said by Mr. Justice Holmes in the *Schenck* case, 249 U. S. at 51, "Of course the document would not have been sent unless it had been intended to have some effect * * *." When sent to officers in the army, sworn to prosecute the war, inflammatory pamphlets representing that they had been betrayed, urging the destruction of their allies, and counselling them to turn the war into one between races, were intended to produce, if possible, disloyalty and refusal of duty. So the jury found.

We consider next whether this finding was precluded or supported by other evidence. Petitioner's signed statement to Government officers (R. 54–60), after describing his background and methods of work, concluded with the following explanation of his purposes (R. 60):

> Finally, the prime motive which impelled me in writing and distributi. g the articles discussed above, was the hope that they might tend to create sentiment against war amongst the white races and in diverting the war from them, to unite the white races against what I consider to be the more dangerous enemies, the yellow races.

This statement is not inconsistent with, but indeed reinforces, the conclusion regarding petitioner's intent drawn by the jury, when taken with the circumstances of distribution to members of the armed forces. Petitioner's failure, in enumerating the sources of his mailing list, to mention military personnel (R. 59) can fairly be regarded as a studied omission in his statement, for at about the time of making the statement he was enlisting the aid of a fellow-prisoner in an endeavor to secure the destruction of the mailing list disclosed by the envelopes secreted at his home, which he described as containing the names of 25 members of the armed forces (R. 28). It was this disclosure to a fellow-prisoner that led to the discovery of the bag and its contents (R. 21–22).

Additional evidence is found in petitioner's testimony at the trial. On direct examination he made a general denial of intent to do what the statute denounces (R. 81–82). He added, "I have been in the service myself, and I thought it might improve their morale, or indirectly that of the public at large" (R. 81). This statement, hardly credible on its face, was retracted on cross-examination (R. 85). On further direct examination, upon being asked to state his intention in writing and distributing the articles, he said (R. 82–83):

> I always regard my work as from a statistical standpoint and business, and also taking the war aspect, I thought there was a trend toward Communism, and I thought it was quite a dangerous position because of warfare between the white races, it would be the cause of war between the white and yellow races, and rather than have it beat into us, we might as well face the facts and know what we are facing, a certain group of Communists discussing methods, their viewpoints, I wanted to help minimize that so we could again have public standpoint established in this country. I am not in here because I was disloyal, and I have no prison record, but because the Communistic question is beginning to get in here and will cause the disappearance of this court, and the absorption of the executive branches otherwise of the government, the disappearance of the things that I was trying to work toward.

The ready reference to "the Communistic question" as a political matter is scarcely reflected by the documents themselves, which make an appeal for action of a military character. On cross-examination, petitioner stated: "I think the effect on the troops of saying that America was betrayed would be for them to consider whether it was or not and if so, to fight for Americans" (R. 85). In the idiom of petitioner, to fight "for Americans" necessarily meant to fight against some of

their fellow countrymen and their comrades in arms.

There were also received in evidence several pamphlets written and circulated by petitioner before our entry into the war (R. 61–75, 56–57, 91–92). These are of the same tenor as those prepared and circulated thereafter. The trial court carefully instructed the jury that it was not an offense under the statute to publish such matter before we were at war, for any purpose, and that those documents were to be considered only on the issue of petitioner's intent in publishing the later documents. The evidence was clearly admissible for that purpose.[5] There was no occasion to exclude it on the ground that it might be unduly prejudicial, since it was by no means more unbridled in tone than the three pamphlets composed and circulated after the nation was at war.

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[5] *Williamson* v. *United States*, 207 U. S. 425; *Allis* v. *United States*, 155 U. S. 117, 119; *Wood* v. *United States*, 16 Pet. 341, 360–361; *Viereck* v. *United States*, 130 F. (2d) 945, 959–960 (App. D. C.), reversed on other grounds, 318 U. S. 236; *United States* v. *Pelley*, 132 F. (2d) 170, 180–181 (C. C. A. 7), certiorari denied, 318 U. S. 764; *Schoborg* v. *United States*, 264 Fed. 1, 7 (C. C. A. 6), certiorari denied, 253 U. S. 494; *Howenstine* v. *United States*, 263 Fed. 1, 5–6 (C. C. A. 9); *Stenzel* v. *United States*, 261 Fed. 161, 162 (C. C. A. 8); *Shidler* v. *United States*, 257 Fed. 620, 623 (C. C. A. 9); *Herman* v. *United States*, 257 Fed. 601, 603–604 (C. C. A. 9), certiorari denied, 251 U. S. 558; *Coldwell* v. *United States*, 256 Fed. 805, 811–812 (C. C. A. 1), certiorari denied, 250 U. S. 661; *Kirchner* v. *United States*, 255 Fed. 301, 304–305 (C. C. A. 4), certiorari dismissed, 250 U. S. 678.

Whatever may have been petitioner's psychological compulsions, the evidence warrants the finding that he intended to cause disloyalty and refusal of duty in the military forces. This is sufficient "although there may be some deeper motive behind." Holmes, J., in *Abrams* v. *United States*, 250 U. S. at 627.

In the present case there was no showing of a more dominant intention, such as an endeavor to win converts to a political or economic doctrine. Compare the dissenting opinions in *Pierce* v. *United States*, 252 U. S. 239, and *Schaefer* v. *United States*, 251 U. S. 466. Judge Holly, in denying petitioner's motion for a new trial, observed (R. 106):

> * * * Counsel say the evidence does not show that intent. I cannot agree. All of the circumstances of the case, it seems to me, the very language of the pamphlets composed and distributed by Hartzell show such intent. For what purpose other than hindering the carrying on of the war in any way did he have or could he have had in mind? He appeared on the stand to be an unusually shrewd person. The story he tells of his education and his activities indicate that whatever he does is deliberate and with a definite purpose. He is not a fanatic attached to a cause, having political and economic theories for the liberation of oppressed peoples as were the defendants in *Pierce* v. *United States*,

> 252 U. S. 239, and *Abrams* v. *United States,* 250 U. S. 616, where Justices Holmes and Brandeis in dissenting opinions found that the literature distributed by the defendants had as its purpose propagating certain economic ideas rather than interfering with enlistment or recruiting or insubordination or disloyalty to the army. * * *

The present case stands in contrast to a number of prosecutions growing out of the last war which in the judgment of time, and indeed of appellate courts, are seen to have been ill-founded. This is not a case of prosecution for a casual, unpatriotic utterance (cf. *Von Bank* v. *United States,* 253 Fed. 641 (C. C. A. 8); *Erhardt* v. *United States,* 268 Fed. 326 (C. C. A. 7)), or a casual disparaging statement (cf. *Mead* v. *United States,* 257 Fed. 639 (C. C. A. 9)). It is not simply a case of a gloomy forecast concerning the war (cf. *Grubl* v. *United States,* 264 Fed. 44 (C. C. A. 8)), or a protest at a particular item in the Government's war program, such as the treatment of conscientious objectors (cf. *United States* v. *Steene,* 263 Fed. 130 (N. D. N. Y.), reversed on confession of error, 255 U. S. 580). This is a case of deliberate, well-planned, and persistent endeavor extending over a substantial period of time. Hundreds of leaflets were sent to selected individuals. They were obviously meant to have a cumulative effect on the recipients. There can

be no doubt that they were intended to break down the will to carry on the war.

The present case, finally, is not simply that of intemperate criticism of the war, its strategy, or its purposes. "We do not lose our right to condemn either measures or men because the Country is at war." *Frohwerk* v. *United States,* 249 U. S. 204, 208. Utterances are not sought to be punished merely because they may have the effect of causing discontent among the people, including the armed forces.[6] But when they are ad-

[6] The language of the statute was designed to avoid making criminal all utterances which might produce such discontent. See the statement of Congressman Webb, 55 Cong. Rec. 1594:

> As originally drawn that section prohibited the attempt to cause disaffection in the armed forces. The committee did not like the word "disaffection." It was too broad and too elastic and too indefinite. Therefore in order to make it more clearly understood we struck the word "disaffection" from the bill and inserted in lieu thereof the words "insubordination, disloyalty, or refusal of duty," and we think the House will agree with us that the amendment was a good one. We felt that to make it a crime to create disaffection in a soldier's breast might ofttimes subject a perfectly innocent person to punishment. A mother might write to a boy and tell him the sad conditions back home. That would create disaffection and discontent in the boy's breast. It would not create or attempt to create disloyalty to his flag, insubordination to authority, or refusal to perform duty, and so we have made that section so that it will protect an honest man, and we feel that it will get the dishonest fellow who deliberately undertakes to spread disloyalty, insubordination, or refusal to perform duty in our armed forces.

dressed to members of the armed forces and intended to cause military personnel to renounce their obligation, to treat associates in arms as military enemies, and to turn the war against the latter, the permissible bounds have been crossed. Such utterances are not, any more than were those in the *Schenck* case, "within the scope of that right to criticise either by temperate reasoning, or by immoderate and indecent invective, which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority". L. Hand, J., in *Masses Pub. Co.* v. *Patten,* 244 Fed. 535, 539 (S. D. N. Y.).

2. *Clear and present danger.* The jury found that the petitioner's acts during time of war constituted a clear and present danger of causing disloyalty, refusal of duty, or insubordination in the armed forces. As Mr. Justice Brandeis observed in *Schaefer* v. *United States,* 251 U. S. 466, 483, "because it is a question of degree the field in which the jury may exercise its judgment is, necessarily, a wide one", though the duty rests on the courts to withdraw the case from the jury if "men, judging in calmness, could not reasonably say that [the words] created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent". We submit that the trial court properly left the issue to the jury.

Before considering the evidence on this issue, it may be helpful to observe that in the present case the elements entering into the statutory offense of an attempt include in substance those to which Mr. Justice Holmes gave prominence in formulating, as a constitutional test, the clear and present danger rule. The cases arising out of the first world war under the Espionage Act were virtually all cases of conspiracies.[7] That charge required, of course, only an unlawful plan and an overt act in furtherance of it. The statute marked out no point in advance of which utterances might be regarded as too remote to constitute an offense, particularly in view of the privilege of free speech. The test formulated by Mr. Justice Holmes was quite evidently based on the distinction which he had already drawn in the criminal law between conspiracy and attempt. See, e. g., *Hyde* v. *United States*, 225 U. S. 347, 384–391. His analysis of attempts emphasized, as interrelated elements, a specific intent, proximity to success, and the seriousness of the crime denounced. In the *Hyde* case, his dissenting opinion pointed out that a criminal attempt required that "there must be dangerous proximity to success" (p. 388). Again, speaking of an

[7] *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, 249 U. S. 204; *Abrams* v. *United States*, 250 U. S. 616; *Schaefer* v. *United States*, 251 U. S. 466; *Pierce* v. *United States*, 252 U. S. 239. In *Debs* v. *United States*, 249 U. S. 211, no conspiracy was involved.

attempt, he pointed out that it may be punished "where it is so near to the result that if coupled with an intent to produce that result, the danger is very great." In *Swift & Co.* v. *United States,* 196 U. S. 375, 396, he had adumbrated the view that specific intent is important not merely from a moral standpoint but from a practical standpoint as well, since "where acts * * * require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen." Not only the specific intent, and the proximity to success, but the nature of the evil to be avoided, was important in marking the definition of an attempt. In *Commonwealth* v. *Peaslee,* 177 Mass. 267, 272, he had said: "As was observed in a recent case, the degree of proximity held sufficient may vary with circumstances, including among other things the apprehension which the particular crime is calculated to excite."

Faced with the necessity of adjusting the permissible bounds of the law of conspiracy to the constitutional privilege of free speech, it was natural that Mr. Justice Holmes should have drawn on his analysis of the law of attempts. In the *Abrams* case the relation between the clear and present danger test and the elements of an attempt was made explicit in Mr. Justice Holmes' dissent (250 U. S. at 628): "Now nobody can

suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable."[8]

Petitioner's intent has, we believe, been established by the verdict and the evidence. The last act required on his part, the placing of the leaflets in the hands of the addressees, was completed. The danger apprehended by Congress was of the most critical kind. In a war for national survival,

[8] See also the letter of Holmes to Pollock, on the subject of the *Abrams* case: "I think it possible that I was wrong in thinking that there was no evidence on the Fourth Count in consequence of my attention being absorbed by the two leaflets that were set forth. But I still am of opinion that I was right, if I am right in what I devoutly believe, that an actual intent to hinder the U. S. in its war *with* Germany must be proved. As the *Debs case* and two others were assigned to me, in which the convictions were upheld, I thought it proper to state what I thought the limits of the doctrine. The general principles laid down by me I think correct, and the particular conclusion I adhere to, because even if there were evidence of a conspiracy to obstruct, etc., the overt act laid must be an act done to effect the object of the conspiracy and it seems to me plain that the only object of the leaflets was to hinder our interference with Russia. I ought to have developed this in the opinion. But that is ancient history now." 2 Holmes-Pollock Letters, p. 32.

the defection of military personnel is a matter of grave concern, as reflected in the severity of the military offense involved. Implicit in the Espionage Act of 1917 is the legislative judgment that it is necessary and desirable, in the prosecution of a war, to protect our fighting men from utterances designed to subvert them from their sworn duty. Unlike the order in *Bridges* v. *California*, 314 U. S. 252, 261, the determination that members of the armed forces should be insulated from utterances intended to cause insubordination and disloyalty comes before the Court "encased in the armor wrought by prior legislative deliberation".[9]

Petitioner chose to reach officers of relatively high rank. If the likelihood of success was less in that case, the stakes of success were clearly higher, and the resulting peril greater. Can it be said that the possibility of subverting the addressees from their duty was so preposterous that no attempt was committed? The question, it should be noted, does not turn on the incorruptibility of the particular persons addressed. The very concept of an attempt presupposes failure. In other fields of the criminal law, the moral or physical strength of the intended victims does not relieve a defendant of responsibility for an attempt upon them. Thus, with respect to attempts

[9] The *Bridges* case differs significantly from this case, of course, in other respects as well; that case involved no question of military personnel in time of war, or even of threatening utterances specifically addressed to a judge.

to bribe a judge, Coke said: "But admit the party offereth a bribe to the judge meaning to corrupt him in the cause depending before him, and the judge taketh it not, yet this is an offense punishable by law in the party that doth offer it." [10] Likewise, an effort to poison another is none the less a criminal attempt because the dosage is too small for the purpose.[11] And it would hardly be suggested that, in a situation perhaps more comparable to that here presented, a criminal attempt has not been committed where the quantity of poison administered is so large that it is detected and rejected by the intended victim. In view of the size and character of our armed forces, drawn from all segments of our population and with diversified backgrounds and propensities, can it be said that the success of an endeavor to sway them from their path of duty by the means which petitioner employed is merely fanciful, like an attempt to kill by witchcraft, which "is really no attempt at all to kill"? [12]

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[10] Coke, Third Institute 147, quoted in Sayre, Criminal Attempts, 41 Harv. L. Rev. 833, n. 47.

[11] See Holmes, J., in *Commonwealth* v. *Kennedy*, 170 Mass. 18, 22. See also J. Hall, *Criminal Attempt*, 49 Yale L. J. 835, n. 185: "There are occasional decisions holding that if the substance administered was not poisonous at all, though the defendant believed so, there was no criminal intent. These are early decisions that hark back to the era when unsuccessful pickpockets were held not guilty."

[12] Pollock, C. B., in *Attorney General* v. *Sillem*, 2 H. & C. 431, 525, quoted in Beale, *Criminal Attempts*, 16 Harv. L. Rev. 496, n. 1.

So to conclude would be, it is submitted, to ignore much of what recent history teaches of the power of outrageous speech, when intensified by constant repetition and a calculating design, to move to action. "Psychological warfare" has become as familiar as it has been proved effective. That which has been employed in Europe to instill fanatical hatreds in masses of the people can hardly be held by a court to be patently incapable of achieving results. It may fairly be asked whether material of the sort here involved, if it were changed to substitute enemy leaders and enemy objectives for our own, and were circulated in similar quarters in an enemy country, could not be thought to have a genuine chance of weakening the military will. Much of the effort of the belligerents in psychological warfare must be put down as mere fantasy if material of this sort is incapable of causing disloyalty or refusal of duty.[13]

Nor can we ignore the military situation when the pamphlets were distributed, in the summer of 1942. The fortunes of the war were at that time grimly unfavorable to the United Na-

[13] Cf. Hearings before Subcommittee No. 4 of House Judiciary Committee, 77th Cong., 1st sess., on H. R. 6045 (Foreign Agents Registration Act), 12–14, 21–23 (Statement of Chief of Special Defense Unit, Department of Justice); National Research Council, *Psychology For the Fighting Man* (1943), 16–18, 330, 430–447; Farago, *German Psychological Warfare* (1941); Childs and Whitton, eds., *Propaganda by Short Wave* (1942), 51–108, 263–301; Rolo, *Radio Goes To War* (1940), 94–126.

tions. The peril of a Japanese invasion of Australia was very real. The Allied forces were pushed back from New Guinea to the borders of India. The Burma Road, the supply line to China, was cut. In Russia the Caucasian oil fields were threatened and Leningrad was surrounded. In Africa the enemy was only seventy-five miles from the Suez canal. In June, 1942, 111 vessels of the United Nations were sunk. It was in these circumstances that petitioner sought to arouse members of the armed forces to act on the conclusion that the war was a gross betrayal of this country and that it should be abandoned in favor of a racial conflict. Here, as in *Frohwerk* v. *United States*, 249 U. S. 204, 209, "we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame * * *."

The clear and present danger test is a "rule of reason" which "can be applied correctly only by the exercise of good judgment" Brandeis, J., dissenting, in *Schaefer* v. *United States*, 251 U. S. 466, 482–483. "Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities, and from abuse by irresponsible, fanatical minorities." *Ibid.* Even in time of war suppression must be viewed with concern, for the need of discussion and debate persists, in the interest of wise de-

cisions. But all would agree that there are occasions during war when the "rule of reason" may serve to preclude some forms of utterance, as, for example, a speech denouncing the war made to troops on the eve of battle. Utterances made to members of the armed forces for the very purpose of weakening their loyalty may, it is submitted, be treated in the same way, without sacrificing the acknowledged value of freedom of speech.

Ordinarily it would be preferable, and mandatory, to act upon the injunction that "the fitting remedy for evil counsels is good ones." Brandeis, J., in *Whitney* v. *California,* 274 U. S. 357, 375. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Id.* at 377. The same Justice said, in *Gilbert* v. *Minnesota,* 254 U. S. 325, 336, 338 (dissenting): "As an incident of its power to declare war it may, when the public safety demands, require from every citizen full support, and may, to avert a clear and present danger, prohibit interference by persuasion with the giving of such support. * * * There are times when those charged with the responsibility of Government, faced with clear and present danger, may conclude that suppression of divergent opinion is imperative; because the emergency does not permit reliance upon the

slower conquest of error by truth. And in such emergencies the power to suppress exists."[14] Here we have both such an emergency and action having a criminal purpose, as the jury found. In that context, Congress is entitled to choose the remedy of the criminal law rather than the open forum. Were this not so, the nation's power of self-protection and of protection of its armed

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[14] In *Gilbert* v. *Minnesota*, the power of Congress to raise and support an army, under which the Espionage Act of 1917 was passed, was thought by Mr. Justice Brandeis to preclude the state legislation there involved. In the later case of *Near* v. *Minnesota*, 283 U. S. 697, there was not even an ostensible relation to the war powers, and the statute, suppressing defamatory political publications, was held an interference with liberty of the press. The statute resembled the Sedition Act of 1798. The difference between such acts and that here involved was recognized by the opponents of the 1798 law. John Nicholas of Virginia, who was the chief spokesman in Congress for the repeal of the Sedition Act, said (9 Annals of Congress, p. 3010):

> I have seen somewhere, and I beg leave here to remark on it, the authority of the Convention who formed the Constitution of Virginia, quoted to justify this construction. That Convention is said to have passed a law similar to the law of Congress, after having provided for the liberty of the press in their bill of rights. Let us examine that law. The first section is to punish those who shall "by any word, open deed, or act, advisedly and willingly maintain and defend the authority, jurisdiction, or power of the King, or Parliament of Great Britain, heretofore claimed over this Colony, or shall attribute any such authority," &c. This section, passed at the beginning of the most awful contest in which ever man was engaged, a contest for the right of self-government against one of the most powerful nations in the world, was to estab-

forces would have to depend upon a judgment of the courts that such measures must await a time when the country is more clearly *in extremis.*[15]

III

The evidence was sufficient to sustain the conviction for obstructing the recruiting and enlistment service

If it becomes necessary to consider counts one, three, and five, charging willful obstruction of the recruiting and enlistment service, it is submitted that the evidence likewise sustains the conviction for this offense. Two elements in the definition of the offense will first be discussed.

The meaning of the phrase "recruiting and enlistment service" includes more than voluntary

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lish what? Not the inviolability of the Governor of the State, nor of the majority of either House of the Legislature, but to punish men who should promote resistance to the right of the people to govern themselves, to the principle of the Constitution, to the republican principle. So different is this from the object of the law of Congress, that it would have been impossible to believe that they should have been compared, if we had not seen it done.

The difference is epitomized in the fact that while the 1917 Act is operative only in time of war, the 1798 Act by its terms expired with the close of the incumbent political administration, on March 3, 1801.

[15] The words of R. L. Stevenson, in another context, are apt: "This is no cabinet science, in which things are tested to a scruple; we theorize with a pistol to our head; we are confronted with a new set of conditions on which we have not only to pass judgment, but to take action, before the hour is at an end."—Quoted in Lazarsfeld and Merton, Studies in Radio and Film Propaganda, Trans. N. Y. Acad. Sci., Ser. II, Vol. 6, No. 2, p. 59 (Dec. 1943).

enlistments. It includes the draft as well. This was established in *Schenck* v. *United States,* 249 U. S. 47, 53, the Court holding that the term "recruiting" meant "gaining fresh supplies for the forces, as well by draft as otherwise." This meaning has not been questioned by Congress or the courts, and is apparently accepted by petitioner.

The meaning of "obstruction" appears, however, to be brought in issue by petitioner. An argument is made (Brief, 31–32) to the effect that, to support the charge of wilfully obstructing the recruiting or enlistment service, the accomplishment of that end must be shown. It is not clear whether petitioner argues that an actual decline in recruiting or an actual preventing of persons from reporting for duty must be proved. No such instruction was requested in the trial court. It is established that no such proof is necessary. In one of the early cases under the statute, *Masses Publishing Company* v. *Patten,* 244 Fed 535 (S. D. N. Y.), Judge Learned Hand observed, "I am not prepared to assent to the plaintiff's position that this only refers to acts other than words, nor that the act thus defined must be shown to have been successful. One may obstruct without preventing, and the mere obstruction is an injury to the service; for it throws impediments in its way" (p. 541). The same construction was given the provision in

O'Hare v. *United States,* 253 Fed. 538, 540 (C. C. A. 8), certiorari denied, 249 U. S. 598, and *Rhuberg* v. *United States,* 255 Fed. 865 (C. C. A. 9). The *Masses* case was reversed by the Circuit Court of Appeals for the Second Circuit on the ground that Judge Hand gave an unduly narrow construction to the statute in requiring that the words used must in themselves advocate obstruction, insubordination, and the like; but on the issue here involved, the meaning of obstruction, the decision was approved. *Masses Publishing Company* v. *Patten,* 246 Fed. 24, 38. In recent cases the provision has been given the same interpretation. *United States* v. *Pelley,* 132 F. (2d) 170, 178 (C. C. A. 7), certiorari denied, 318 U. S. 764; *Butler* v. *United States,* 138 F. (2d) 977, 980 (C. C. A. 7). It is true that a few lower courts originally held that the absence of the word "attempt" from this portion of the statute required proof of actual prevention of enlistment or actual refusal to report for induction. E. g., *United States* v. *Hall,* 248 Fed. 150 (D. Mont.). For that reason, in response to a request by the Attorney General (see Report of the Attorney General, 1918, p. 18) Congress included in the 1918 amendment of the Act a clause expressly making an attempt to obstruct the recruiting and enlistment service a crime. Act of May 16, 1918, 40 Stat. 553. The sponsors of the bill, however, declared that in so doing they were not giving legislative sanction to the decisions which had constructed

the Act narrowly. See 56 Cong. Rec. 4561.[16] Consequently, the repeal in 1921 (41 Stat. 1360) of the 1918 amendment, which had added a large number of other provisions beyond those requested by the Attorney General, cannot be taken as limiting the meaning of the provision as found in the 1917 Act.[17]

In considering the evidence, it is necessary to distinguish between agitation for political change and a purpose to obstruct the recruiting and enlistment service. Criticism of the conduct of the war, which might have a tendency to affect ad-

[16] Explaining the genesis of the 1918 amendment, J. L. O'Brian said: "The Attorney General * * * requested also that the last clause of the section be clarified by including specifically 'attempts' to obstruct the recruiting and enlistment service." Report of New York State Bar Association, 1919, 302.

[17] Each count of the indictment here involved included an allegation of "injury of the Service of the United States" (R. 4, 8, 11). It is doubtful whether such an allegation is necessary to charge an offense under this section of the statute. (See *United States* v. *Pierce*, 245 Fed. 878 (N. D. N. Y.), affirmed in *Pierce* v. *United States*, 252 U. S. 239). The phrase did not appear in the House bill (H. R. 291, 65th Cong., 1st Sess.) which was the basis of the enacted statute (see H. Rep. No. 30, 65th Cong., 1st Sess., Sec. 5). It did appear in a similar bill introduced in the Senate (S. 2) to which was added the clause punishing obstruction of the recruiting and enlistment service (see 55 Cong. Rec. 871). It seems likely, therefore, that when the clause punishing the obstruction of the recruiting service was added to the House bill (see H. Rep. No. 69, 65th Cong., 1st Sess.) the phrase "to the injury of the service" was intended to apply only to that clause. This construction is supported by the fact that the phrase would be without meaning when applied to the first part of the statute punishing false statements. The question,

versely the willingness of men to serve in the armed forces, is not thereby rendered criminal. It is submitted that petitioner's activities support the jury's determination that the requisite intent under the statute was established. The whole tenor of petitioner's pamphlets was a highly emotional and scurrilous attack upon our position in the war, together with praise of Germany and extenuation of Japan. The entry of the United States into the war produced no apparent change in petitioner's publications. They are not directed at questions of military strategy or military competence, nor do they reflect an endeavor to further some more comprehensive social program, in which the war might be only an incident of discussion.

The argument that the petitioner was engaged merely in political pamphleteering and that accordingly his mailing list was composed of "representative prominent people" (R. 79–80) is not wholly consistent with the character of the addressees whom he sought to reach. The selection of organizations such as the Airline Pilots' Asso-

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although raised by petitioner (Br. 48) is immaterial here, since there can be no question that an attempt to undermine the morale of high ranking officers would constitute an injury to the service. Nor is injury to the service a separate element of proof under the clause relating to recruiting and enlistment. *Cf.* L. Hand, J., in *Masses Pub. Co.* v. *Patten*, 244 Fed. 535, 541: "One may obstruct without preventing, and the mere obstruction is an injury to the service; for it throws impediments in its way."

ciation, the American Legion, fraternities and labor unions (R. 20, 59), suggests an attempt to reach organizations of men of military age. In any event, petitioner admitted in his testimony that he thought the country at large and the troops ought to consider the consequences of war; and that the effect on the troops of saying that America had been betrayed would be to have them consider whether, if so, they should "fight for Americans" (R. 85). It is a fair interpretation of this testimony that he intended his publications to have the same effect on the public at large. This purpose was a purpose to weaken the will to join the armed forces. The sending of the pamphlets to men subject to military service, with such a purpose, was an offense under the statute. Cf. *Debs* v. *United States*, 249 U. S. 211. The third pamphlet is particularly significant in this respect. Counseling the destruction of those who would again invade Europe, and the occupation of the United States by foreign troops if necessary, is the advocacy of methods of terminating the war which are incompatible with voluntary enlistment or with the orderly process of the draft.

In prohibiting willful endeavor of this sort, Congress was mindful of the fact that under a regime of compulsory military service in time of war, men subject to such service need not be exposed to the competing urgings of those who would have them aid in carrying on the war and those who

would not. As was pointed out by Mr. Justice Brandeis, dissenting, in *Gilbert* v. *Minnesota*, 254 U. S. 325, 339–340, except for the conscription law of 1863, our law prior to the World War "left an American as free to advise his fellows not to enter the Army or the Navy as he was free to recommend their enlistment". But, as the opinion proceeds to point out, our national policy in that regard was changed in 1917 under the impact of the war. It is submitted that petitioner was properly found, on the basis of his course of activity and his testimony, to have placed impediments in the way of gathering forces for the armed services, and to have done so with that intention.

CONCLUSION

The affirmance of the conviction on any one count is sufficient to sustain the judgment in this case. For the reasons stated we submit that each of the first six counts may be sustained. We therefore respectfully submit that the judgment should be affirmed.

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APRIL 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES.

No. 531.—October Term, 1943.

Elmer Hartzel, Petitioner,
vs.
United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[June 12, 1944.]

Mr. Justice Murphy announced the conclusion and judgment of the Court.

For the first time during the course of the present war we are confronted with a prosecution under the Espionage Act of 1917.[1] The narrow issue is whether there was sufficient evidence to support the jury's determination that petitioner violated the Act in that, in time of war, he willfully attempted to cause insubordination, disloyalty, mutiny and refusal of duty in the armed forces and willfully obstructed the recruiting and enlistment service of the United States.

Petitioner and two others were charged in a seven-count indictment with violations of the second and third clauses[2] of Section 3 of the Act, together with a violation of Section 4. It was alleged that in time of war they published and disseminated three pamphlets to numerous persons and organizations, among whom were individuals available and eligible for recruitment and enlistment in the military and naval forces of the United States as well as individuals already members of the armed forces. Counts 1, 3 and 5 charged that by these actions they willfully obstructed the recruiting and enlistment service of the United States in violation of the third clause of Section 3. Counts 2, 4 and 6

[1] Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 50 U. S. C. § 31 *et seq.*

[2] The second and third clauses of Section 3 of the Act provide as follows: "Whoever, when the United States is at war, . . . shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both." 40 Stat. 217, 219, 41 Stat. 1359, 50 U. S. C. § 33.

charged that these activities constituted a willful attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States in violation of the second clause of Section 3. Count 7 charged a conspiracy to violate Section 3, in violation of Section 4 of the Act. Petitioner was found guilty on all counts and was sentenced generally to five years in prison. The court below affirmed his conviction on appeal.[3] 138 F. 2d 169. The importance of the issues involved led us to grant certiorari. 320 U. S. 734.

Petitioner, an American citizen, was born 52 years ago in Pennsylvania. His ancestors, of Scotch, Irish and German descent, came to this country over 120 years ago. He enlisted in the armed forces in 1917 and served overseas. After his honorable discharge in 1919, he was employed in the city health department at Akron, Ohio, while earning a degree in science at Akron University. He then took courses in economics and political economy at the University of Chicago and became a financial analyst and statistician for various banks, investment brokers and investment companies in Chicago. After 1938 he was employed as an auditor and statistician, first by the state of Illinois and then by the federal government in corporations in Detroit and Chicago producing material for the United States Army Air Corps. During all this time he had constantly engaged in economic research on his own behalf and several articles by him were published in reputable business and financial periodicals. There was no evidence of his having been associated in any way with any foreign or subversive organization.

Prior to the entry of the United States into the present war, petitioner wrote several short articles containing scurrilous and vitriolic attacks on the English, the Jews and the President of the United States. Americans were urged not to ally themselves with the English. Only a German victory, it was said, would bring "increased stability and safety for the West." Petitioner had

3 Petitioner's co-defendants — Mecartney, an attorney, and Soller, the mimeographer — were found guilty on counts 5, 6 and 7. But the trial judge set aside Mecartney's conviction on a motion for a new trial on the ground that there was no evidence that he had any active part in the distribution of the pamphlets produced by petitioner. Soller's conviction was set aside by the court below on the ground that there was no proof that he knew what use petitioner made of the pamphlets. Mecartney and Soller were the only co-conspirators of petitioner named in the indictment and the setting aside of their convictions makes it impossible to sustain petitioner's conviction upon the basis of count 7, the conspiracy count.

certain of these articles mimeographed by various individuals in Chicago, including one Elmer Soller, who was later indicted as a co-defendant with petitioner. Several hundred copies of the mimeographed articles were mailed by petitioner to individuals and organizations appearing on his mailing list.

Petitioner then wrote three articles in 1942 which formed the basis for his conviction under the Espionage Act of 1917. These articles repeated the same themes and were marked by the same calumny and invective; they are set out at length in the opinion of the court below, 138 F. 2d at 170-172, and need not be repeated here. In substance, they depict the war as a gross betrayal of America, denounce our English allies and the Jews and assail in reckless terms the integrity and patriotism of the President of the United States. They call for an abandonment of our allies and a conversion of the war into a racial conflict. They further urge an "internal war of race against race" and "occupation [of America] by foreign troops until we are able to stand alone."

After writing these articles, petitioner had them mimeographed by his co-defendant Soller and mailed about six hundred copies of them, anonymously, to persons and organizations on his mailing list. In order to avoid detection, he deposited the envelopes in several different mail boxes and endeavored to leave no fingerprints.[4] He had compiled this mailing list from several sources: (1) the World Almanac, which gave him the names of various prominent people, associations, fraternities, sororities, etc.; (2) a government publication containing a list of labor unions; (3) daily newspapers which mentioned the names of people actively engaged in the America First Committee; and (4) telephone directories at the public library which gave him the names of various state and district commanders of the American Legion. Included

[4] Petitioner testified that "I sent the documents out anonymously because I almost lost my job several times and I knew I had to be careful and also because of a great deal of espionage in the community. I did not sign my name to the documents I sent out for the same reason. . . . I took them out and dropped them in several boxes. I did that because with such a large quantity of them, I thought someone might throw them out. I mailed them all at once, but I dropped one hundred in one box and another hundred in each of four or five boxes. I didn't put them all in one box simply because, if someone would throw one out they would throw them all out. I had a suspicion that someone in authority might well find these articles and throw them out for the reasons I gave you. I had heard that fingerprints would be identified so I put my hand over it like that (indicating). I was suspicious of it for the same reasons I gave you." There was no evidence contradicting any of this testimony.

in his list were such persons as United States senators, representatives, bishops and other church officials; such organizations as the Daughters of the American Revolution and We the Mothers Mobilize were also included.

The Government proved that two of these pamphlets were mailed to and read by the Commanding General of the United States Army Air Forces and a colonel attached to the General Staff. All three pamphlets were mailed to the United States Infantry Association, which publishes the Infantry Journal, a service publication, and were read at its headquarters by two Army officers in the course of their duties. The evidence also showed that one or more of the pamphlets were received in the mail by the president of Northwestern University, the American Newspaper Publishers Association, the Kiwanis International, the Lions International, the Air Line Pilots Association and the American Legion, Department of Illinois. Individuals registered under the Selective Training and Service Act of 1940 and employed by these various organizations read the pamphlets in the ordinary course of their work, including one 20-year old clerk whose duty it was to open the incoming mail at the office of the Lions International. In addition, envelopes addressed to at least eighteen high ranking Army officers were found secreted under a bathtub in petitioner's home, together with several of the pamphlets.

Shortly after being taken into custody, petitioner signed a statement in which he claimed that "the prime motive which impelled me in writing and distributing the articles discussed above, was the hope that they might tend to create sentiment against war amongst the white races and in diverting the war from them, to unite the white races against what I consider to be the more dangerous enemies, the yellow races." At the trial he testified that "I thought there was a trend toward Communism, and I thought it was quite a dangerous position because of warfare between the white races, it would be the cause of war between the white and yellow races and rather than have it beat into us, we might as well face the facts and know what we are facing, a certain group of Communists discussing methods, their viewpoints. I wanted to help minimize that so we could again have public standpoint established in this country." He said he thought his articles might improve the morale of persons available and eligible for recruiting and enlistment in the armed forces, though he retracted

this statement on cross-examination. His efforts, he thought, "were political in character" and "the effect on the troops of saying that America was betrayed would be for them to consider whether it was or not and if so, to fight for Americans."

On the basis of these facts, petitioner was found guilty of violating the second and third clauses of Section 3 of the Act. These clauses are directed at those who, in time of war, "willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States," or who, in time of war, "willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States". Thus, these clauses punish the making and dissemination of statements and writings which are intended to have the evil effects set forth by Congress. No question is here raised as to the constitutionality of these provisions or as to the sufficiency of the indictment returned thereunder. But such legislation, being penal in nature and restricting the right to speak and write freely, must be construed narrowly and "must be taken to use its words in a strict and accurate sense." Mr. Justice Holmes, dissenting in *Abrams* v. *United States*, 250 U. S. 616 at 627.

The language of the second and third clauses of Section 3 makes clear that two major elements are necessary to constitute an offense under these clauses. The first element is a subjective one, consisting of a specific intent or evil purpose at the time of the alleged overt acts to cause insubordination or disloyalty in the armed forces or to obstruct the recruiting and enlistment service. This requirement of a specific intent springs from the statutory use of the word "willfully." That word, when applied in the context of a highly penal statute restricting freedom of expression, must be taken to mean deliberately and with a specific purpose to do the acts proscribed by Congress. Cf. *United States* v. *Murdock*, 290 U. S. 389 at 394; *United States* v. *Illinois Cent. R. Co.*, 303 U. S. 239 at 242; *Braverman* v. *United States*, 317 U. S. 49 at 53; *Sacher* v. *United States*, 317 U. S. 492 at 497. The second element is an objective one, consisting of a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent. *Schenck* v. *United States*, 249 U. S. 47. Both elements must be proved by the Government beyond a reasonable doubt.

The requisite specific intent in such a case as this may be proved not only by the language actually used in the statements or writings themselves but also by the circumstances surrounding their preparation and dissemination. But, so far as the record in this case is concerned, neither of these sources is productive of evidence from which a jury could properly find beyond a reasonable doubt that petitioner had such an intent at the time he composed and mailed the three pamphlets. For that reason alone the conviction must be reversed.

There is nothing on the face of the three pamphlets in question to indicate that petitioner intended specifically to cause insubordination, disloyalty, mutiny or refusal of duty in the military forces or to obstruct the recruiting and enlistment service. No direct or affirmative appeals are made to that effect and no mention is made of military personnel or of persons registered under the Selective Training and Service Act. They contain, instead, vicious and unreasoning attacks on one of our military allies, flagrant appeals to false and sinister racial theories and gross libels of the President. Few ideas are more odious to the majority of the American people or more destructive of national unity in time of war. But while such iniquitous doctrines may be used under certain circumstances as vehicles for the purposeful undermining of the morale and loyalty of the armed forces and those persons of draft age, they cannot by themselves be taken as proof beyond a reasonable doubt that petitioner had the narrow intent requisite to a violation of this statute.

Nor do the circumstances of the distribution of the three pamphlets, supplemented by petitioner's pretrial statement, his testimony and the similar articles written and disseminated by him before the war, supply sufficient evidence of the necessary intent. There was no evidence that petitioner intended to influence military personnel or individuals of draft age in the manner forbidden by the statute in composing his mailing list or in sending his pamphlets to those listed therein. His purpose, rather, appears to have been to obtain the names of prominent individuals and organizations and to propagate his ideas among them. The fact that some of these individuals and some of the representatives of these organizations were of draft age was not shown to have been dominant, or even present, in petitioner's mind or to have motivated him in any degree. And the fact that he mailed his pamphlets to at least

four high ranking Army officers and addressed envelopes to at least eighteen others is not evidence from which the jury could infer beyond a reasonable doubt that he intended to cause insubordination, disloyalty, mutiny or refusal of duty among them. Their inclusion in a mailing list of six hundred persons and organizations is quite consistent with a mere intent to influence public opinion and to circulate malicious political propaganda among outstanding personages, whether they be in the armed forces or not.

His prewar writings, if they should be taken into account at all, are no more indicative of the necessary intent than are the three pamphlets in issue. His statements and testimony concerning his motive in preparing and distributing the three pamphlets are likewise indecisive. Proof that he intended, in his words, to "create sentiment against war amongst the white races" and to "unite the white races against what I consider to be the more dangerous enemies, the yellow races" does not satisfy the burden which rests on the Government to prove beyond a reasonable doubt that petitioner had the purpose or intent to do what is outlawed by Section 3 of this Act. Thoughtlessness, carelessness and even recklessness are not substitutes for the more specific state of mind which the statute makes an essential ingredient of the crime.

We are not unmindful of the fact that the United States is now engaged in a total war for national survival and that total war of the modern variety cannot be won by a doubtful, disunited nation in which any appreciable sector is disloyal. For that reason our enemies have developed psychological warfare to a high degree in an effort to cause unrest and disloyalty. Much of this type of warfare takes the form of insidious propaganda in the manner and tenor displayed by petitioner's three pamphlets. Crude appeals to overthrow the government or to discard our arms in open mutiny are seldom made. Emphasis is laid, rather, on such matters as the futility of our war aims, the vices of our allies and the inadequacy of our leadership. But the mere fact that such ideas are enunciated by a citizen is not enough by itself to warrant a finding of a criminal intent to violate Section 3 of the Espionage Act. Unless there is sufficient evidence from which a jury could infer beyond a reasonable doubt that he intended to bring about the specific consequences prohibited by the Act, an American citi-

zen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective without running afoul of the Espionage Act of 1917. Such evidence was not present in this case.

The judgment of the court below is

Reversed.

Mr. Justice Roberts.

Without discussing the evidence in detail or characterizing the petitioner's conduct, I deem it sufficient to say that I concur in the view that there was not sufficient evidence in the case to warrant submission to the jury. The conviction of violation of the statute should, therefore, be reversed.

Mr. Justice Reed, with whom Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Jackson concur, dissenting.

The First Amendment to the Constitution preserves freedom of speech and of the press in war as well as in peace. The right to criticize the Government and the handling of the war is not questioned. Congress has not sought, directly or indirectly, to abridge the right of anyone to present his views on the conduct of the war or the making of the peace. The legislation under which Hartzel was tried and convicted was aimed at those who, in time of war, "shall willfully cause or attempt to cause insubordination, disloyalty, or refusal of duty, in the military or naval forces of the United States." It is only when the requisite intent to produce those results is present that criticism may cross over the line of prohibited conduct. The constitutional power of Congress so to protect the national interest is beyond question. *Schenck* v. *United States*, 249 U. S. 47.

If the petitioner committed acts from which a properly instructed jury could reasonably conclude that the requisite intention existed to cause the evils against which the statute is directed, the sufficience was proper. As the verdict was general, we need only to examine the proceedings under the count of the indictment which charged violation of the law in the words quoted in the preceding paragraph. *Hirabayashi* v. *United States*, 320 U. S. 81, 105.

Petitioner urges that these articles, which contain on their face no explicit call upon the military to disobey orders, act in a disloyal manner, mutiny or disregard their duty, cannot be a violation of the statute because they offer no proof of the necessary intent and none is offered outside of the papers themselves. We think that this argument fails. Congress has made it an offense willfully to attempt to cause insubordination and likewise willfully to obstruct the recruiting and enlistment service of the Nation. It does not commend itself to us to hold that thereby Congress was merely concerned with crude attempts to undermine the war effort but gave free play to less obvious and more skillful ways of bringing about the same mischievous results. Papers or speeches may contain incitements for the military to be insubordinate or to mutiny without a specific call upon the armed forces so to act. If circulated for the purpose of undermining military discipline, scurrilous articles, attacking an ally, a minority of our citizens and the President, may contain, without words of solicitation, indications of purpose sufficient, if accepted as true, from which to draw an intent to accomplish the unlawful results.

Moreover, when the other evidence is added to the articles themselves, we think that enough facts revealing the requisite intent were presented to justify the verdict. Other similar articles circulated prior to the declaration of war tended to show a continuing intention. The articles which were the basis of the indictment were sent to military officers including those of the highest rank. This circumstance is brought forward by petitioner as indicative of a lack of intention to undermine the military forces. This was doubtless weighed by the jury, but certainly it cannot be said that circulation of propaganda among officers shows less intention to proselyte than to circulate among the enlisted personnel. Copies were sent to the Infantry Journal, a publication circulating largely in the armed forces. Nothing appears as to any motive, other than interference with discipline, that the petitioner might have in distributing this type of pamphlet to professional military officers. The jury was entitled to weigh the fact that the articles were sent anonymously. The jury was also entitled to weigh the fact that those to whom the articles were sent were hand-picked and composed a select group. These actions speak as loud as words.

Hartzel himself, moreover, made a statement which was introduced at the trial. In it he told of the preparation of the pamph-

lets, the selection of the mailing list from among prominent personages and associations and his reason for his acts. His intent appears in these words:

> "Finally, the prime motive which impelled me in writing and distributing the articles discussed above, was the hope that they might tend to create sentiment against war amongst the white races and in diverting the war from them, to unite the white races against what I consider to be the more dangerous enemies, the yellow races."

The jury might well infer from the quoted paragraph that Hartzel, by placing these pamphlets in military hands, was attempting to cause insubordination among the troops. He sought to develop sentiment "against war among the white races." Germans are a "white race."

These pamphlets were distributed in 1942. The military situation was then nothing like so strong as now nor confidence in our strategy so uniform. A large segment of public opinion desired to concentrate against Japan, rather than Germany and Italy, a viewpoint which doubtless had advocates among the members of the armed forces. It was an opportune time from the viewpoint of the German enemy to put pamphlets such as these in circulation which taught suspicion of Britain, vilified Jews and promoted lack of confidence in the President. On the question of intention, the circumstances under which the pamphlets were distributed were important and entitled to weight. Petitioner played precisely upon those prejudices from which at that time insubordination or disloyalty was most likely to develop.

We are not a jury passing on Hartzel's state of mind. Our sole and very limited duty is to decide whether there was evidence enough warranting the trial judge letting the case go to the jury, whether 12 jurymen had warrant for their finding that Hartzel's very purpose was to undermine the will of our soldiers to fight our Nazi enemy, and whether the Circuit Court of Appeals was warranted in sustaining such a finding. We are at a loss to know what other intent is to be attributed to the dissemination of these documents to our soldiery. To adapt the language of Mr. Justice Holmes speaking for a unanimous Court in *Schenck* v. *United States*, 249 U. S. 41, 51, of course the documents would not have been sent unless they had been intended to have some effect, and we do not see what effect they could be expected to

have upon persons in the military service except to influence them to obstruct the carrying on of the war against Germany when petitioner deemed that a betrayal of our country.

As the trial judge aptly stated:

> "All of the circumstances of the case, it seems to me, the very language of the pamphlets composed and distributed by Hartzell show such intent. For what purpose other than hindering the carrying on of the war in any way did he have or could he have had in mind? He appeared on the stand to be an unusually shrewd person. The story he tells of his education and his activities indicate that whatever he does is deliberate and with a definite purpose. He is not a fanatic attached to a cause, having political and economic theories for the liberation of oppressed peoples as were the defendants in *Pierce* v. *United States*, 252 U. S. 239, and *Abrams* v. *United States*, 250 U. S. 616, where Justices Holmes and Brandeis in dissenting opinions found that the literature distributed by the defendants had as its purpose propagating certain economic ideas rather than interfering with enlistment or recruiting or insubordination or disloyalty to the army. In this case the jury were warranted in presuming from the preparation and circulation of the literature that Hartzell intended to obstruct enlistment and recruiting and to cause insubordination and disloyalty in the military service of the United States."

On these facts we would intrude on the historic function of the jury in criminal trials to say that the requisite intent "to cause insubordination, disloyalty, or refusal of duty, in the military or naval forces" was lacking. The right of free speech is vital. But the necessity of finding beyond a reasonable doubt the intent to produce the prohibited result affords abundant protection to those whose criticism is directed to legitimate ends.